STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

In re:	**1998 OAL Determination No. 7**
Request for Regulatory Determination filed by BRIAN PADDOCK, ESQ., concerning the DEPARTMENT OF SOCIAL SERVICES' Letter No. 90-18 and the accompanying "Child Support Enforcement Program Notice" which concerns notice to participants under the Title IV-D program of the Social Security Act of their rights and responsibilities	**[Docket No. 91-001]** **June 18, 1998** **Determination Pursuant to Government Code Section 11340.5; Title 1, California Code of Regulations, Chapter 1, Article 3**

Determination by: EDWARD G. HEIDIG, Director

HERBERT F. BOLZ, Supervising Attorney
LINDA A. FRICK, Senior Staff Counsel

SYNOPSIS

The issue presented to the Office of Administrative Law is whether two specific policies, one concerning the attorney-client relationship, the other, the consequences of hiring a private attorney, issued by the Department of Social Services, related to the Child Support Enforcement Program, are "regulations" and, therefore, without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA").

The Office of Administrative Law has concluded that the two policies are "regulations" required to be adopted in compliance with the Administrative Procedure Act.

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THE ISSUE PRESENTED[1]

The Office of Administrative Law ("OAL") has been requested[2] to determine[3] whether two policies, one concerning the attorney-client relationship, the other, the consequences of hiring a private attorney, contained in "Child Support Enforcement Program Notice" attached to Department of Social Services' ("DSS") Family Support Division Letter No. 90-18 are "regulations" required to be adopted pursuant to the Administrative Procedure Act ("APA").[4],[5]

THE DECISION[6],[7],[8],[9]

OAL finds that:

(1) Rules issued by the Department are specifically required by the Welfare and Institutions Code to be adopted pursuant to the Administrative Procedure Act ("APA");

(2) The challenged policies are "regulations" as defined in the key provision of Government Code section 11342, subdivision (b);

(3) The challenged policies violate Government Code section 11340.5, subdivision (a).

ANALYSIS

I. BACKGROUND

A. The State Agency

The Department of Social Services ("Department" or "DSS") is under the cabinet-level Health and Welfare Agency.[10] It is responsible for supervising the delivery of cash grants and social services to needy persons in California.[11]

In addition to the duties noted above, pursuant to federal law, the Department is also responsible for administering the state plan for securing child and spousal support and determining paternity, known as the Child Support Enforcement

Program ("CSEP"), supervised by the state and administered by local district attorneys.[12]

The Department has been granted general rulemaking authority.[13] The Director has authority to adopt rules in accordance with the APA; however, the rules may be printed in the DSS *Manual of Policies and Procedures* ("Manual" or "MPP"),[14] rather than in the California Code of Regulations ("CCR").

Congress enacted the Aid to Families with Dependent Children ("AFDC" or "Title IV-A") program as a part of the Social Security Act to provide financial and medical assistance to needy families. Section 602(a)(27) of the AFDC program provides:

> "(a) A State plan for aid and services to needy families with children must--
>
> . . . .
>
> (27) provide that the State has in effect a plan approved under part D of this subchapter [IV] and operates a child support program in substantial compliance with such plan; . . . .".[15]

Section 602(a)(27) is referring to Title IV, Part D, sections 651 through 669, of the Social Security Act, known as the Child Support Enforcement Act ("Title IV-D"), enacted by Congress in 1975.[16] The AFDC program and Title IV-D provide grants to states which elect to participate in the AFDC program and provide child support collection services under Title IV-D.

California elected to participate in the AFDC program and enacted statutes implementing the AFDC program and Title IV-D.[17] Title IV-D requires states to locate absent parents, establish paternity, obtain support orders and collect support payments. Title IV-D also requires states to develop a state plan which describes the nature and scope of its child support enforcement program ("IV-D program"). The states are authorized to delegate functions of the IV-D program to appropriate courts or law enforcement officials with whom a cooperative agreement has been entered.[18]

California also participates in the Title IV-E Federal Payments for Foster Care and Adoption Assistance program.[19] This program also requires an approved state plan which

"*Provides* that, where appropriate, *all steps will be taken*, including cooperative efforts with the State agencies administering the program funded under part A of this subchapter and plan approved under part D of this subchapter, *to secure an assignment to the State of any rights to support* on behalf of each child receiving foster care maintenance payments under this part."[20] [Emphasis added.]

To comply with the collection requirements under each of these programs, the Department has entered into a cooperative agreement with each county district attorney's office to handle support obligations.[21],[22]

B. This Request for Determination

This request for determination was made by Brian Paddock, Esq. ("requester"). The requester asks for a determination concerning policies in the Department's Family Support Division ("FSD") Letter 90-18 ("Letter") dated September 25, 1990, directed to "All District Attorneys" and "All IV-D Directors" and the attached "Child Support Enforcement Program ("CSEP") Notice" ("Notice"). The Letter states that:

"Effective October 1, 1990, the IV-D agency is mandated by State and Federal regulations to provide the CSEP Notice along with all applications for IV-D services and to all AFDC, Medicaid and Title IV-E foster care applicants or recipients within no more than five working days of referral to the IV-D agency. The CSEP Notice describes available IV-D services, the individuals' rights and responsibilities, and the State's fees, cost recovery and distribution policies."

The requester is specifically concerned about two statements within the "Notice" attached to the Letter.[23]

Statement "1"

"THEY [the District Attorney/Family Support Office (DA/FSO)] DO NOT REPRESENT YOU AND ARE NOT YOUR ATTORNEY. Because you are not their client the information you provide is not confidential under attorney/client privilege." ("attorney-client representation")

. . .

Statement "2"

> "If you do hire an attorney, you must report this to the DA/FSO. In some instances this will result in the DA/FSO closing your case." ("case closure")

The requester queries whether the Department must adopt these two statements as regulations pursuant to the APA.

On April 25, 1997, OAL published a summary of this request for determination in the California Regulatory Notice Register,[24] along with a notice inviting public comment.[25] No public comments were received. The Department filed a response on June 9, 1997.

II. DISCUSSION

A. IS THE APA GENERALLY APPLICABLE TO THE DEPARTMENT OF SOCIAL SERVICES?

For purposes of the APA, Government Code section 11000 defines the term "state agency" as follows:

> "As used in this title [Title 2. Government of the State of California (which title encompasses the APA)], 'state agency' includes every *state* office, officer, *department*, division, bureau, board, and commission." [Emphasis added.]

The APA further clarifies or narrows the definition of "state agency" from that in section 11000 by specifically excluding "an agency in the judicial or legislative departments of the state government."[26] The Department is in neither the judicial nor legislative branch of state government.[27]

OAL concludes that the Department is a state agency within the meaning of the APA.

In addition, the Welfare and Institutions Code[28] specifically requires the Department's "regulations" to be adopted pursuant to the APA. OAL is unaware of any specific statutory exemption which would permit the Department to conduct rulemaking without complying with the APA. Therefore, the APA is generally applicable to the Department.

B. DOES THE CHALLENGED RULE CONSTITUTE A "REGULATION" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

Government Code section 11342, subdivision (g), defines "regulation" as:

> ". . . *every rule*, regulation, order, or standard of general application or *the amendment, supplement or revision of any rule*, regulation, order or standard *adopted* by any state agency *to implement, interpret, or make specific the law enforced or administered by it*, or to govern its procedure . . . ." [Emphasis added.]

In *Grier v. Kizer*,[29] the California Court of Appeal upheld OAL's two-part test as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

> First, is the challenged rule either:
>
> - a rule or standard of general application, *or*
> - a modification or supplement to such a rule?
>
> Second, has the challenged rule been adopted by the agency to either:
>
> - implement, interpret, or make specific the law enforced or administered by the agency, *or*
> - govern the agency's procedure?

If an uncodified rule fails to satisfy either of the above two parts of the test, OAL must conclude that it is *not* a "regulation" and *not* subject to the APA.[30] In applying the two-part test, however, OAL is guided by the *Grier* court:

> ". . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra,* 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA*. [Emphasis added.]"[31]

1. Is the challenged rule either a rule or standard of general application or a modification or supplement to such a rule?

The answer to the first part of the inquiry is "yes." For an agency rule or standard to be of "general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order."[32] In FSD Letter No. 90-18 directed to "All District Attorneys" and "All IV-D Directors," the Department states the letter's purpose as:

> ". . . transmit[ting] an advance copy of the Child Support Enforcement Program (CSEP) Notice (CS 196). . . [and] the IV-D *agency is mandated* by State and Federal regulations *to provide the CSEP Notice* along with all applications for IV-D services and *to all* AFDC, Medicaid and Title IV-E foster care *applicants or recipients* . . ."

Since the Letter was directed statewide to all District Attorneys and Title IV-D Directors who were *mandated to distribute* the Notice *to all applicants,* it is apparent that the Letter and Notice were applied statewide. Thus, it is clear that the Letter and Notice are standards of general application.

2. Have the challenged rules been adopted to implement, interpret or make specific the law enforced by the agency or govern the agency's procedure?

Having established that the statements of policy are standards of general application, the next issue is whether the challenged policies have been adopted by the Department to implement, interpret, or make specific the law, CSEP, enforced or administered by the Department. The answer to this part of the inquiry is also "yes" with respect to both statements--"1" and "2."

The Department argues that the issue of whether these statements are regulations subject to the APA has become moot for different factual reasons for each statement. The Department also argues that the statements merely restate existing law[33] and therefore do not "implement, interpret or make specific the law enforced by the agency." Because there are factual differences for each statement, they will be addressed separately.

Statement No. 1 (attorney-client relationship)

"The District Attorney/Family Support Office (DA/FSO) provides services on behalf of the State of California. THEY DO NOT REPRESENT YOU AND ARE NOT YOUR ATTORNEY. Because you are not their client the information you provide is not confidential under attorney/client privilege.

a. Mootness

The Department argues that the issue is moot because the language in the Notice is now in statute. Welfare and Institutions Code section 11478.2, effective January 1, 1992, states:

> (a) In all actions involving paternity or support, including, but not limited to, proceedings under the Family Code, and under this division, the district attorney and Attorney General represent the public interest in establishing, modifying, and enforcing support obligations. *No attorney-client relationship shall be deemed to have been created between the district attorney or Attorney General and any person by virtue of the action of the district attorney or the Attorney General in carrying out these statutory duties.* [Emphasis added.]
>
> (b) The provisions of subdivision (a) are declarative of existing law.
>
> (c) In all requests for services of the district attorney or Attorney General pursuant to Section 11475.1 relating to actions involving paternity or support, not later than the same day an individual makes a request for these services in person, and not later than five working days after either (1) a case is referred for services from the county welfare department, (2) receipt of a request by mail for an application for services, or (3) an individual makes a request for services by telephone, the district attorney or Attorney General *shall give notice to the individual requesting services or on whose behalf services have been requested that the district attorney or Attorney General does not represent the individual or the children who are the subject of the case, that no attorney-client relationship exists between the district attorney or Attorney General and those persons, and that no such representation or relationship shall arise if the district attorney or Attorney General provides the services requested.* Notice shall be in bold print and in plain English and shall be translated into the language understandable by the recipient when reasonable. *The notice shall include the advice that the absence of an attorney-client relationship means that communications from*

the recipient are not privileged and that the district attorney or Attorney General may provide support enforcement services to the other parent in the future." [Emphasis added.]

The Department argues that statement "1" merely repeats what is in the statute now and, therefore, the request is moot.

OAL has found previously,[34] however, that subsequent laws or actions (e.g., rescission of the policy) by the agency do not change the obligation of OAL under its own statutes and regulations to issue a determination based upon the law and facts at the time the request was filed. In this case, the requester has stated that he is still desirous of obtaining an OAL determination, notwithstanding legal changes.

The Department also argues that the Notice has been replaced with modifications several times since the 1990 version. However, the fact that a document is no longer in effect does not relieve OAL of its obligation to issue a determination.[35] In this case, the law (added in 1991) was not in place prior to the issuance of the Letter, which was dated September 25, 1990, effective October 1, 1990. The validity of the challenged statement must be tested against the law as it existed when the statement was issued. Therefore, OAL will address the request despite the fact that at the time this determination is issued the policy contained in a new Notice issued after 1991 *may*[36] be a restatement of law.

b. Restatement of Law

As stated above, the Department is the "single organizational unit whose duty it shall be to administer the state plan for securing child and spousal support and determining paternity."[37] The Director of the Department "shall . . . adopt, . . . regulations . . . securing . . . support orders . . . ."[38] [Emphasis added.]

The Department asserts, however, that none of the challenged documents implements, interprets, or makes specific any part of the Act, but rather restates its requirements. In essence, the Department is responding that the law is itself clear, specific and unambiguous in articulating requirements discussed in the challenged documents, which do not add to or modify any requirements contained in the Act.

California Court of Appeal cases provide guidance on the proper approach to take when assessing claims that agency rules are *not* subject to the APA because they

merely restate the law. According to *Engelmann v. State Board of Education* (1991), agencies need not adopt as regulations those rules contained in:

> "[a] statutory scheme which the Legislature has established. . . ."[39]
>
> "But to the extent any of the [agency rules] depart from, or *embellish* upon express statutory authorization and language, the [agency] will need to promulgate regulations . . . ." [40] [Emphasis added.]

Similarly, agency rules properly promulgated *as regulations* (i.e., California Code of Regulations provisions) cannot legally be "embellished upon" in administrative bulletins.[41]

Union of American Physicians and Dentists v. Kizer (1990)[42] describes in general the limits on a state agency's issuance of rules which have not been processed under the APA. The court held that a terse 24-word definition of "intermediate physician service" in a Medi-Cal regulation could not legally be supplemented by a lengthy seven-paragraph passage in an administrative bulletin that went "far beyond" the text of the duly adopted regulation.[43] The Department of Health Services asserted that the bulletin was not a regulation subject to the APA because (1) the bulletin's stated purpose was to *supplement* information in a duly adopted regulation and to *help clarify* billing guidelines and (2) the challenged documentation requirements were *simply informational* in nature and did not seek to substantially regulate behavior.[44]

Despite the Department's effort to label[45] the document as "supplemental" or "informational," the court found the contentions unpersuasive because the Bulletin and documents "interpret[ed] or ma[d]e specific"[46] the law.

In a previous OAL determination[47] concerning the State Water Resources Control Board, OAL described what differentiates a rule which is the "only legally tenable" interpretation of the law from a rule which "implements, interprets, or makes specific" the law.

> "In general, if the agency *does not add to, interpret, or modify* the statute, it *may* legally *inform* interested parties in writing of the statute and 'its application. . . .'" [Emphasis added.]
>
> . . . "In a previous Determination we stated:

'If a rule simply applies an *existing* constitutional, statutory or regulatory requirement that has only one legally tenable "interpretation," that rule is not quasi-legislative in nature--no new "law" is created.'[48] [Emphasis added.]"

"Therefore, if the requirements in the Act relevant to the challenged documents can only be read one way, then those same requirements, if included in the challenged documents, are no more than restatements of the law. For this reason, *the Act itself must be examined* to determine whether the *requirements contained in the challenged documents* are also present in the Act."[Emphasis added.]

No party has cited to any statute, regulation or case in existence in 1990 which stands for the proposition that the District Attorney is not representing the applicants as their attorney or vice versa. The Department states that there is no authority for the proposition that an attorney-client relationship exists between the district attorney and recipients of child support enforcement services. The Department implies that if there is *no express provision of law,* explicitly establishing an attorney-client relationship, *then the law is* that there is no such relationship. This argument fails in that a state agency only can argue a policy merely restates the law when the law is in existence. If there is no express law, a state agency cannot argue that whatever policy they propose to fill the vacuum thus becomes the law. State agencies may not establish law without action of the Legislature and Governor.

The statement in the "Notice" was not merely a restatement of the law because there was no statutory or decisional law on the point.

The fact that the statute[49] asserts in subdivision (b) that "*the provisions of subdivision (a) are declarative of existing law*" is not dispositive.[50],[51] As pointed out above, there was no definitive law on the issue in 1990. The Legislature itself provides further evidence that the law was not clear on this point in 1990 (when the Letter and Notice were issued). The May 7, 1991 analysis by the Office of Senate Floor Analyses of the Senate Rules Committee on SB 106 specifically acknowledges that:

"*In recent years, a debate* has begun on the issue of whom the district attorney and Attorney General represent when they carry out these [child support enforcement program] duties. Several court cases have been filed

which have suggested that district attorneys who are involved in child support enforcement cases act to protect the custodial parent's interest and rights. The argument hinges on the existence of an attorney-client relationship between the district attorney and the custodial parent." [Emphasis added.]

. . .

"In a recent case arising in Monterey County, the trial court, and later the Court of Appeal, found that the district attorney's involvement in the case sufficiently protected the custodial parents ['] rights and interests . . . and 'implied the existence of an attorney-client relationship between the district attorney and the custodial parent.'"

The statute[52] now provides that:

". . . *the district attorney* or Attorney General *shall give notice* to the individual requesting services . . . *that the district attorney* or Attorney General *does not represent* the individual . . . , *that no attorney-client relationship exists between the district attorney . . . and* that no such representation or relationship shall arise if the district attorney . . . provides the services requested . . . absence of an attorney-client relationship means that *communications from the recipient are not privileged. . . .*" [Emphasis added.]

The fact that the Legislature enacted this statute may[53] mean that a statement included in recent versions of the notice is a restatement of a statute and, therefore, not a regulation subject to the APA. However, the fact that the Legislature acted to resolve a legal uncertainty at that time cannot serve as the basis for a finding that there was no pre-existing uncertainty.

Without more evidence that the statement related to the attorney-client privilege was specifically in law prior to the Notice's mailing, OAL cannot find that the statement is merely a restatement of the law. Therefore, OAL concludes that the first statement interprets and makes specific the law.

Statement No. 2 (case closure)

"If you do hire an attorney, you must report this to the DA/FSO. In some

instances this will result in the DA/FSO closing your case."

a. Mootness

The Department argues that in light of clarification from the United States Department of Health and Human Services ("DHHS"),[54] it has removed the second statement from subsequent Notices; therefore, the request is moot as to this statement. However, the second statement is not moot because it has been removed from the "form" for the same reasons outlined above in the discussion on Statement 1. OAL must analyze the request in light of the law in existence at the time of the request; subsequent changes to the law or to the statement will not automatically eliminate OAL's duty to respond to the request.

b. Restatement of Law

The Department argues that the second statement is merely a restatement of federal law.[55] Also, the Department asserts that language in 45 CFR 303.11 was the *basis* for the regulation. If the Department is only asserting the federal regulation as a "basis" for the statement, then the Department is in essence admitting that the statement is either implementing or interpreting or making more specific a federal rule it must enforce. However, if the Department intends to argue that the statement is a restatement of the law, rather than the basis for the statement, then the federal regulation must be examined carefully to determine if the language in statement No. 2 (case closure) departs[56] from the federal regulation.

However, the Department has not specifically pointed to anything in the federal Social Security Act, nor the federal regulation which regulates case closures occurring as a result of hiring private attorneys. The Department has the burden[57] to clearly indicate to the public and OAL the source of the summarized statement of law. In this case, the Department has not carried its burden that this language in statement No. 2 mirrors language in 45 CFR 303.11. Since in this instance there is no language in the federal rules which is clearly and unambiguously the basis of the statement in the Notice, the position of the Department that the statement did not have to be adopted according to the APA is not persuasive.

Clearly, the Department issued these policies, specifically the two statements, to implement, interpret or make specific the law it administers and enforces--the state IV-D program, and they are, therefore, "regulations."

C. DO THE CHALLENGED RULES FOUND TO BE "REGULATIONS" FALL WITHIN ANY ESTABLISHED *GENERAL EXCEPTION* TO APA REQUIREMENTS?

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute.[58] However, rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.[59]

The only exception which the Department claims the Notice falls within is the one for "forms." This position fails for two reasons: the "Notice" is not a form and even if OAL treats it as such, it contains regulatory material, not otherwise exempted from following the APA.

Government Code section 11342, subdivision (g) provides:

> "'Regulation' does not mean . . . *any form* prescribed by a state agency or any instructions relating to the use of the form, *but this provision is not a limitation upon any requirement that a regulation be adopted pursuant to this part when one is needed to implement the law under which the form is issued.*" [Emphasis added.][60]

The so-called "form" is a two-sided, one page document containing several paragraphs providing information. There are no blanks or boxes to fill out; it is not a document to be completed and returned.

The Department takes the position that its Manual of Policies and Procedures Section 12-103.13 (although not printed in the CCR's [see endnote 14] the Manual is a duly adopted regulation of Social Services) requires,[61] pursuant to federal regulation,[62] that a notice be given to applicants regarding their rights and responsibilities. Therefore, the Notice is merely a form and the Letter 90-18 a transmittal "informing counties of the availability of the form [Notice]." This position combines two arguments which will be addressed separately; first, that the Notice merely repeats what is in the Manual, and does not interpret any law and second, that the Notice is a form exempt from the APA.

There is no language in the Manual specific enough for the Department to argue that the rights and responsibilities specifically described in the Notice are merely a restatement of the Manual, a properly adopted regulation. The Manual simply

says ". . . [p]rovide the following information with the application: . . . [t]he applicant's rights and responsibilities."[See endnote 61.] The Manual refers neither to private attorney representation nor to case closure. The Department thus has not met its burden[63] to show how the specific language used in statement 2 related to case closure reflects language found in the Manual. The Statement supplements and makes specific the general language quoted above.

With respect to the argument that the "Notice" is a "form" and automatically excepted from the APA, we conclude: (1) that the contents of the Letter and Notice are not a form and (2) all forms are not exempted automatically from the APA.

"Form," according to *Black's Law Dictionary* is

> "A model or skeleton of an instrument to be used in a judicial proceeding or legal transaction, containing the principal necessary matters, the proper technical terms or phrases and whatever else is necessary to make it formally correct, arranged in proper and methodical order, and capable of being adapted to the circumstances of the specific case or transaction.
>
> *In contradistinction to 'substance,' 'form' means the legal or technical manner or order to be observed in legal instruments* or juridical proceedings, or in the construction of legal documents or processes. *Antithesis of 'substance.'"* [Emphasis added.]

In advising persons of their rights and responsibilities pursuant to 45 CFR 303.2(a)2 and MPP section 12-103.13, the Department informed the applicants or recipients of "substance," not form. In the vernacular, a "form" is something to be filled out according to instructions. A "form" is not typically an informative document. Instructions, which tell how to complete a "form" may accompany a it, but the Notice in this instance is neither a form to be filled out, nor an instruction on how to complete a form.

OAL has looked for legislative history, without success, explaining why the form language was added to the APA in 1957.[64] There is nothing in the plain language of the statute[65] or in the legislative history to indicate that the Legislature intended to broaden the meaning of "form" under the APA to include a document which informs people of their rights and resolves disputed legal issues.

Furthermore, any interpretive language in this document, whether one calls it a form or not, is subject to the APA process. Government Code section 11342, subdivision (g), includes in the definition of "regulation" a restriction on the use of the "form" exception. The limits to the "form" exception have been covered in a previous determination:

> "According to the leading case, *Stoneham v. Rushen*, the language quoted directly above creates a 'statutory exemption relating to *operational* forms.' (Emphasis added.)[66] An example of an operational form would be as follows: a form which simply provides an operationally convenient space in which, for example, applicants for licenses can write down information that existing provisions of law already require them to furnish to the agency, such as the name of the applicant."
>
> "By contrast, if an agency form goes beyond *existing legal requirements*, then, under Government Code section 11342, subdivision (b), a formal regulation is '*needed to implement the law under which the form is issued.*' For example, a hypothetical licensing agency form might require applicants to fill in marital status, race, and religion--when none of these items of information was required by existing law. The hypothetical licensing agency would be making new law: i.e., 'no application for a license will be approved unless the applicant completes our application form, i.e., furnishes his or her name, marital status, race, and religion.' [Emphasis added.]"
>
> "In other words, according to the *Stoneham* Court, if a form contains 'uniform substantive' rules which are used to implement a statute, those rules must be promulgated in compliance with the APA. On the other hand, a 'regulation is *not* needed to implement the law under which the form is issued' (emphasis added) insofar as the form in question is a simple operational form limited in scope to *existing* legal requirements."
>
> "In sharp contrast, the Agency Response reads section 11342 as exempting from the APA 'any' form prescribed by a state agency. This reading of section 11342 is too broad."
>
> "An interpretation of the forms language in section 11342 which permits agencies to avoid APA rulemaking requirements by the simple expedient of typing regulatory material into a form would lead to absurd consequences. There would be no limit to the degree to which agencies would be able to

avoid public notice and comment, OAL review, and publication in the California Code of Regulations. Read in context, and in light of the authoritative interpretation rendered by the *Stoneham* Court, section 11342 cannot be reasonably interpreted in the broad fashion proposed by the Agency Response. (Endnote: [It is not plausible] that the *Armistead* Court would have reached a different conclusion and *upheld* the employee resignation rule involved in that case if the Personnel Board had simply thought to incorporate the rule in a form or form instruction.)"[67]

Therefore, even if the Notice were treated as a "form," it contains "uniform substantive" rules to implement the statute, which must independently be adopted pursuant to the APA. The Department has brought no statute, regulation or case to OAL's attention which, at the time the request was filed, gave the district attorneys authority to act pursuant to the statements' directions related to attorney-client privilege or case closure. For the same reasons set out in *Stoneham* and the **1993 OAL Determination No. 5,** quoted above, we conclude that the contents of the Notice go beyond existing legal requirements and, to be valid, must be issued pursuant to the notice and comment requirements of the APA.

III. CONCLUSION

For the reasons set forth above, OAL finds that:

(1) Rules issued by the Department are specifically required by the Welfare and Institutions Code to be adopted pursuant to the Administrative Procedure Act ("APA");

(2) The challenged policies are "regulations" as defined in the key provision of Government Code section 11342, subdivision (b);

(3) The challenged policies violate Government Code section 11340.5, subdivision (a).

DATE: June 18, 1998

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ENDNOTES

1. The legal background of the regulatory determination program--including a survey of governing case law--is discussed at length in note 2 to **1986 OAL Determination No. 1** (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16, typewritten version, notes pp. 1-4. See also *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, 249-250, review denied (APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of state administrative regulations) (see endnote 3: *Grier* disapproved on other grounds in *Tidewater*).

   In August 1989, a *second* survey of governing case law was published in **1989 OAL Determination No. 13** (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

   In November 1990, a *third* survey of governing case law was published in **1990 OAL Determination No. 12** (Department of Finance, November 2, 1990, Docket No. 89-019 [printed as "89-020"]), California Regulatory Notice Register 90, No.46-Z, page 1693, note 2. The third survey included (1) five appellate court cases which were decided during 1989 and 1990, and (2) two California Attorney General opinions: one opinion issued before the enactment of Government Code section 11340.5, and the other opinion issued thereafter.

   In January 1992, a *fourth* survey of governing case law was published in **1992 OAL Determination No. 1** (Department of Corrections, January 13, 1992, Docket No. 90-010), California Regulatory Notice Register 92, No. 4-Z, page 83, note 2. This fourth survey included two cases holding that government personnel rules could not be enforced unless duly adopted.

   In December 1993, a *fifth* survey of governing law was published in **1993 OAL Determination No. 4** (State Personnel Board and Department of Justice, December 14, 1993, Docket No. 90-020), California Regulatory Notice Register 94, No. 2-Z, page 61, note 3.

   In December 1994, a *sixth* survey of governing law was published in **1994 OAL Determination No. 1** (Department of Education, December 22, 1994, Docket No. 90-021), California Regulatory Notice Register 95, No. 3-Z, page 94, note 3.

   In June 1998, a *seventh* survey of governing law was published in **1998 OAL Determination No. 4** (Department of Fish and Game, June 26, 1998, docket No. 90-049), California Regulatory Notice Register 98, No. 26-Z, p. __, note 1.

2. This request for determination was originally filed on October 26, 1990 by Brian Paddock, Esq., 360 Roberts Hollow Lane, Cookeville, TN 38501-9224, 615-268-2938. Other materials were submitted December 10, 1990. No comments were received from the public.

The Department of Social Services, 744 P Street, Sacramento, CA 95814, 916-654-1205 (Office of Child Support) responded to the request on June 9, 1997 by letter signed by Lawrence Bolton, Deputy Director, DSS.

3. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121(a), provides:

> "'*Determination*' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(g), which is *invalid and unenforceable* unless
>
> > (1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,
> >
> > (2) it has been exempted by statute from the requirements of the APA." (Emphasis added.)

See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied (finding that Department of Health Services' audit method was *invalid and unenforceable* because it was an underground regulation which should be adopted pursuant to the APA); and *Planned Parenthood Affiliates of California v. Swoap* (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 (now 11340.5) in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b)--now subd. (g)-- yet had not been adopted pursuant to the APA, was "*invalid*"). We note that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr. 2d 186, 198. *Grier*, however, is still authoritative, except as specified by the *Tidewater* court. *Tidewater* itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*. Furthermore, *Tidewater* holds that an agency rule issued in violation of the APA is "void," but that agency *action* based upon the voided rule will *not* be automatically invalidated.

4. This determination may be cited as "**1998 OAL Determination No. 7.**"

5. According to Government Code section 11370:

"*Chapter 3.5* (commencing with Section 11340), *Chapter 4* (commencing with Section 11370), *Chapter 4.5* (commencing with section 11400), *and Chapter 5* (commencing with Section 11500) *constitute* and may be cited as, *the Administrative Procedure Act.*" [Emphasis added.]

We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359. Chapters 4, 4.5, and 5, also part of the APA, concern the Office of Administrative Hearings and Administrative Adjudication, respectively.

6. The California Court of Appeal has held that a statistical extrapolation rule utilized by the Department of Health Services in Medi-Cal audits must be adopted pursuant to the APA. *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244 (see endnote 3: *Grier,* disapproved on other grounds in *Tidewater*). Prior to this court decision, OAL had been requested to determine whether this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b) (now subd. (g)), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5 (now 11340.5), OAL issued a determination concluding that the audit rule met the definition of "regulation," and therefore was subject to APA requirements. **1987 OAL Determination No. 10** (Department of Health Services, Docket No. 86-016, August 6, 1987), CRNR 96, No. 8-Z, February 23, 1996, p. 293. The *Grier* court concurred with OAL's conclusion, stating that the

"Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b) [now subd. (g)]. [Citations.]" (219 Cal.App.3d at p. 434, 268 Cal.Rptr. at p. 251.)

Concerning the treatment of **1987 OAL Determination No. 10**, which was submitted to the court for consideration in the case, the court further found:

"While the issue ultimately is one of law for this court, 'the contemporaneous administrative construction of [a statute] by those charged with its enforcement and interpretation is *entitled to great weight*, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]' [Citations.] [Par.] Because [Government Code] section 11347.5, [now 11340.5] subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b) [now subd. (g)], *we accord its determination due consideration.*" [*Id.*; emphasis added.]

See also *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886 (same holding) and note 5 of **1990 OAL Determination No. 4** (Board of Registration for Professional Engineers and Land Surveyors, February 14,

1990, Docket No. 89-010), California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384 (reasons for according due deference consideration to OAL determinations).

7. If an uncodified agency rule is found to violate Government Code section 11340.5, subdivision (a), the rule in question may be validated by formal adoption "as a *regulation*" (Government Code section 11340.5, subd. (b); emphasis added) or by incorporation in a statutory or constitutional provision. See also *California Coastal Commission v. Quanta Investment Corporation* (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.) An agency rule found to violate the APA could also simply be rescinded.

8. Pursuant to Title 1, CCR, section 127, this determination shall become effective on the 30th day after filing with the Secretary of State. This determination was filed with the Secretary of State on the date shown on the first page of this determination.

9. Government Code section 11340.5, subdivision (d) provides that:

> "Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published."

10. Welfare and Institutions Code section 10600.1.

11. *Id.*, section 10600.

12. Welfare and Institutions Code section 11475, subdivision (a) provides :

"(a) The department is hereby designated the single organizational unit whose duty it shall be to administer the state plan for securing child and spousal support and determining paternity. State plan functions shall be performed by other agencies as required by law, by delegation of the department, or by cooperative agreements."

13. Welfare and Institutions Code section 11475, subdivision (b), which states in part:

"The director shall formulate, adopt, amend or repeal, *in accordance with provisions of [Welfare and Institutions Code] Section 10554, regulations and general policies* affecting the purposes, responsibilities, and jurisdiction of the department and which are consistent with law and necessary for the administration of the state plan for securing child and enforcing spousal support orders and determining paternity. . . ." [Emphasis added.]

14. Welfare and Institutions Code section 10554 specifically provides, in part, that:

"T*he director is the only person authorized to adopt regulations*, orders, or standards of

general application to implement, interpret, or make specific the law enforced by the department and such regulations, orders, and standards shall be adopted, amended, or repealed by the director *only in accordance with the provisions of* [*the APA*], provided that *such regulations need not be printed in the California Administrative Code or California Administrative Register if they are included in the publications of the department [i.e., DSS Manual of Policies and Procedures*]. . . ." [Emphasis added.

15. 42 U.S.C. section 602(a)(27).

16. 42 U.S.C. sections 651 - 669.

17. That is, Welfare and Institutions Code sections 11200-11492.1. Also see *Morris v. Cohen* (1983) 149 Cal.App.3d 507, 511, 196 Cal.Rptr. 834, 836.

18. See 42 U.S.C. section 654(7) and 45 CFR section 302.34.

19. Welfare and Institutions Code section 11400 et seq.

20. 42 U.S.C. section 671(17).

21. Welfare and Institutions Code section 11475.1, subdivision (a) provides:

"Each county shall maintain a single organizational unit located in the office of the district attorney which shall have the responsibility for promptly and effectively establishing, modifying, and enforcing child support obligations, including medical support, enforcing spousal support orders established by a court of competent jurisdiction, and determining paternity in the case of a child born out of wedlock. . . ."

22. Welfare and Institutions Code section 11475.2 provides that:

Furthermore, the Department may impose sanctions on "any public agency, which is required by law, by delegation of the department, or by cooperative agreement, to perform functions relating to the state plan for securing child and spousal support and determining paternity [. . . if the Department determines the public agency] to be failing in a substantial manner to comply with any provision of the state plan. . . ."

23. OAL, in a previous Determination invalidated the Department's previous policy of sending Letters containing rulemaking provisions to Title IV-D local agencies without following the APA. **1990 OAL Determination No. 5** (Department of Social Services, March 6, 1990, Docket No. 89-011). CRNR 90, No. 11-Z, March 16, 1990, p. 426.

24. California Regulatory Notice Register 97, No. 17-Z, April 25, 1997; p. 895.

25. *Note Concerning Comments and Responses*

In order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments

on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

26. Government Code section 11342 subdivision (a).

27. See *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746- 747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.

28. See text of Welfare and Institutions Code sections 10554 and 11475 in endnotes 12, 13 and 14 above.

29. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251.

30. *Grier,* 268 Cal.Rptr. at 249, summarizes:

> "The APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations promulgated by the State's many administrative agencies. (Stats.1947, ch. 1425, §§ 1, 11, pp. 2985, 2988; former Gov. Code § 11420, see now § 11346.) Its provisions are applicable to the exercise of any quasi-legislative power conferred by statute. (§ 11346.) The APA requires an agency, inter alia, to give notice of the proposed adoption, amendment or repeal of a regulation (§ 11346.4), to issue a statement of the specific purpose of the proposed action (§ 11346.7), and to afford interested persons the opportunity to present comments on the proposed action (§ 11346.8). *Unless the agency promulgates a regulation in substantial compliance with the APA, the regulation is without legal effect. (Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204, 149 Cal.Rptr. 1, 583 P.2d 744.)" [Emphasis added.] See discussion in endnotes 1 and 3 on *Grier,* disapproved on other grounds in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr. 2d 186, 198.

31. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.

32. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.

33. State agencies may issue restatements of existing law without going through the APA adoption process. *Engelmann v. State Board of Education* ("*Engelmann*") (1991) 2 Cal.App.4th 47, 63, 3 Cal.Rptr.2d 264, 274-275 (Nonduplication standard, Government Code section 11349, subdivision (f), provides that California statutes should *not* be

reiterated in the form of regulations adopted under the APA; state agency must follow the APA, however, when issuing general policies which depart from or embellish upon express statutory language).

Government Code section 11349, subdivision (f), however, also expressly discourages repetition of "any . . . *federal* statute or regulation . . ." (emphasis added) in regulations adopted by California state agencies. See also Title 1, CCR, section 12 (following 11349, subd. (f), language in federal statute and regulation should ordinarily *not* be re-adopted into the CCR). Thus, state agencies may issue restatements not only of existing state law, but also of existing *federal* law--without going through the APA adoption process, if that federal law is found in binding federal statutes or regulations. **1994 OAL Determination No. 1** (Department of Education, Dec. 22, 1994, Docket No. 90-021), typewritten version, pp. 54-55; CRNR 95, No. 3-Z, January 20, 1995, pp. 118-19 (restatements of applicable federal statutes and regulations are not subject to APA); *Private Industry Council v. Employment Development Department* (1997) 57 Cal.App.4th 1290, 1296, 67 Cal.Rptr.2d 669, 671 (if by statute, the Legislature decides that California will participate in a federal grant-in-aid program, applicable federal law binds the state agency charged by the Legislature with implementing the program).

OAL understands the term "federal . . . regulation" to refer to regulations printed in the Code of Federal Regulations, but not to include any other federal pronouncements, such as interpretive guidelines, policy statements, manuals, instructions, directives, letters, unwritten rules, etc. See Government Code section 11346.2 (discouraging specified agencies from duplicating in state regulations, rules that are already found in federal regulations contained in the Code of Federal Regulations).

Further, reading Government Code section 11340.5 together with *Engelmann* makes clear that state agencies must follow APA procedures whenever they issue general rules which interpret, implement, or make specific a federal statute or regulation. (This is the same criterion that applies to general rules issued by state agencies when they interpret a California statute or regulation).

34. **1991 OAL Determination No. 4**, p. 85 (Department of Corrections, April 1, 1991, Docket No. 90-006), CRNR 91, No. 27-Z, July 5, 1991, p. 910; *Memorial, Inc. v. Harris* (9th Cir. 1980) 655 F.2d 905, 910, n. 14. Also see regulations adopted by OAL which state:

> "(a) Within five working days after the date of receipt by OAL of a request for determination, OAL *shall* transmit a written notification of its receipt to the person who submitted the request.
>
> (b) All requests for determination which meet the requirements of Section 122 of these regulations *shall* be considered by OAL in the order in which they are received.

(c) OAL *shall commence active consideration of each request as soon as possible after its receipt* within available program resources." Title 1, CCR, section 123.

. . .

"Within 75 days of the date of publication of the notice regarding the commencement of active consideration of the request for determination, the office *shall* issue a written determination as to whether the state agency rule is a regulation, along with the reasons supporting the determination." [Emphasis added.] Title 1, CCR, section 126.

OAL must thus respond to the request pursuant to its own regulations.

35. **1991 OAL Determination No. 6** (Department of Developmental Services, October 3, 1991, Docket No. 90-008), typewritten version, p. 156; CRNR 91, No. 43-Z, October 25, 1991, p. 1451, at p.1453. Also see **1990 OAL Determination No. 6** (Department of Education, March 20, 1990, Docket No. 89-012), typewritten version, pp. 152-153; CRNR 90, No. 13-Z, March 30, 1990, p. 496.

36. OAL does not reach the question of whether the current Notice, if it contains a similar provision to the statement in 1990, would merely be a restatement of Welfare and Institutions Code section 11478.2.

37. Welfare and Institutions Code section 11475, subdivision (a). See endnote 12 for the text.

38. *Id.*, subdivision (b). See endnote 13 for the text.

39. 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 274

40. *Id.*, 275.

41. *Union of American Physicians v. Kizer* (1990) 223 Cal.App.3d 490, 501, 272 Cal.Rptr. 886, 891, 892.

42. 223 Cal.App.3d 490, 501, 272 Cal.Rptr. 886, 891.

43. *Id.*

44. *Id.*, 892.

45. *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Commission)* ("*SWRCB v. OAL*" (1993) 12 Cal.App.4 697, 702, 16 Cal. Rptr.2d 25, 28, made clear that reviewing authorities focus on the *content* of the challenged agency rule, not the *label* placed on the rule by the agency.

". . . the . . . Government Code [is] careful to provide OAL authority over regulatory measures whether or not they are designated 'regulations' by the relevant agency. In other words, *if it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it.* . . ." (Emphasis added.)

46. *Union of American Physicians*, 272 Cal.Rptr. at 892.

47. **1988 OAL Determination No. 15** (State Water Resources Control Board, September 2, 1988, Docket No. 87-021), p. 9, CRNR 88, No. 38-Z, September 16, 1988, p. 3004.

48. **1986 OAL Determination No. 4** (State Board of Equalization, June 25, 1986, Docket No. 85-005) California Administrative Notice Register 86, No. 28-Z, July 11. 1986, p. B-15, typewritten version, p. 12.

49. Statutes 1991, Chapter 495. Welfare and Institutions Code section 11478.2, subdivision (b).

50. See, *Gibbons & Reed Co. v. Dept. of Motor Vehicles* (1963) 220 Cal.App.2d 277, 287, 33 Cal.Rptr. 688, 694 (overruled on other grounds); *California Emp. Etc. Com. v. Payne* (1947) 31 Cal.2d 210, 213-214; *County of Sacramento v. State* (1982) 134 Cal.App.3d 428, 434, 184 Cal.Rptr. 648, 651, n. 5; *Western Sec. Bank, N.A. v. Superior Court* (1997) 15 Cal.4th 246, 62 Cal.Rptr.2d 243,249.

51. In **1989 Determination No. 16** (California Energy Commission, December 22, 1989, Docket No. 89-004) 550, n.37, CRNR 90, No. 2-Z, January 12, 1990, p. 57. OAL " note[s] that . . It is well recognized that a statement in new legislation to the effect that it does not constitute a change in, but is declaratory of, a preexisting law, is not binding in the courts. Regardless of the recent legislation, a court may still find that there was no intent requirement for eligibility for solar tax credits under former Revenue and Taxation Code sections 17052.5 and 23601."

"As pointed out by CEC, it is not OAL's function to decide the correctness of the challenged interpretation of law. Our function is to merely determine if the interpretation under review is the only viable interpretation (i.e., a restatement) of the law. The San Diego Superior Court case of *William Lyon Company v. Franchise Tax Board* clearly demonstrates that it is not. Thus, we conclude that the challenged intent policy did not merely restate the law, but rather interpreted it."

52. Welfare and Institutions Code section 11478.2, subdivision (c).

53. OAL does not reach the question of whether the current Notice, if it contains a similar provision to the statement in 1990, would merely be a restatement of Welfare and Institutions Code section 11478.2.

54. Action Transmittal OCSE-AT-93-03 issued by DHHS on March 18, 1993.

55. 45 CFR 303.11 provides related to case closure criteria:

(a) The IV-D agency shall establish a system for case closure.

(b) In order to be eligible for closure, the case must meet at least one of the following criteria: . . ."

The regulation goes on for twelve paragraphs describing the situations which are grounds for closure. None of the sections state that hiring an attorney may be grounds for case closure. If the Department was basing its conclusion on something more or on a section which has more meaning to the Department than to the reader, the Department has the burden of coming forward and providing that information to OAL for its consideration. (See Endnote 54***) For the convenience of the reader the regulation is repeated here.

(1) In the case of a child who has reached the age of majority, there is no longer a current support order and arrearages are under $500 or unenforceable under State law;
(2) In the case of a child who has not reached the age of majority, there is no longer a current support order and arrearages are under $500 or unenforceable under State law;
(3) The absent parent or putative father is deceased and no further action, including a levy against the estate, can be taken;
(4) Paternity cannot be established because:
(I) The child is at least 18 years old and action to establish paternity is barred by a statute of limitations which meets the requirements of § 302.70(a)(5) of this chapter;
(ii) A genetic test or a court or administrative process has excluded the putative father and no other putative father can be identified; or
(iii) In accordance with § 303.5(b) of this part, the IV-D agency has determined that it would not be in the best interests of the child to establish paternity in a case involving incest or forcible rape, or in any case where legal proceedings for adoption are pending;
(5) The absent parent's location is unknown, and the State has made regular attempts using multiple sources to locate the absent parent over a three-year period, all of which have been unsuccessful;
(6) The absent parent cannot pay support for the duration of the child's minority because the parent has been institutionalized in a psychiatric facility, is incarcerated with no chance for parole, or has a medically-verified total an permanent disability with no evidence of support potential. The State must also determine that no income or assets are available to the absent parent which could be levied or attached for support;
(7) The absent parent is a citizen of, and lives in, a foreign country, does not work for the Federal government or a company with headquarters or offices in the United States, and has no reachable domestic income or assets; and the State has been unable to establish reciprocity with the country;
(8) The IV-D agency has provided location-only services as requested under § 302.35(c)(3) of this chapter;
(9) The non-AFDC custodial parent requests closure of a case and there is no assignment to the State of [medical support under 42 CFR 433.146 or of] arrearages

which accrued under a support order;
(10) There has been a finding of good cause as set forth at section 302.31(c) and [either sections] 232.40 through 232.49 of this chapter [or 42 CFR 433.147] and the State or local IV-A, IV-E[, or m\Medicaid] agency has determined that support enforcement may not proceed without risk of harm to the child or caretaker relative;
(11) In a non-AFDC case,[receiving services under section 302.33(a)(1) (I) or (iii),] the IV-D agency is unable to contact the custodial parent within a 30 calendar day period despite attempts by both phone and at least one registered [certified] letter; or
(12) In a non-AFDC case, [receiving services under section 302.33(a)(1) (I) or (iii)], the IV-D agency documents the circumstances of the custodial parent's noncooperation and an action by the custodial parent is essential for the next step in providing IV-D services. [Text in brackets is language added since the request was filed.

56. According to *Engelmann v. State Board of Education* (1991) 2 Cal.App.4 49,63, 3 Cal.Rptr.2d 264, 274, agencies need not adopt as regulations those rules contained in "a statutory scheme which the Legislature has already established. . . ."But "to the extent that any of the [agency rules] depart from, or embellish upon express statutory authorization and language, the [agency] will need to promulgate regulations. . . ." Similarly, agency rules properly promulgated *as regulations* (i.e., California Code of Regulations provisions) cannot legally be "embellished upon" in administrative bulletins.

57. Although OAL does not rely solely upon challenges made by the agency to the requester's claims in these 11340.5 determinations, and independently reviews the requests of the agency where there are no specific references to the law and the law is not to be found in the sections to which the issued materials are related, OAL can only search so far for those specific provisions of law -- if they exist. If a claim is made that a challenged rule is not a "regulation" because it merely repeats the law, it is incumbent on the party making that claim to prove its point. Furthermore, the agency is extremely familiar with the statutes and regulations it must enforce or consider and clearly is in the best position to identify provisions which relate to the issue.

58. Government Code section 11346.

59. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

a. Rules relating *only* to the internal management of *the* state agency. (Gov. Code, sec. 11342, subd. (g).)

b. Forms prescribed by a state agency or any instructions relating to the use of the form, *except* where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (g).)

c. Rules that "[establish] or [fix] *rates, prices,* or *tariffs.*" (Gov. Code, sec. 11343, subd. (a)(1).)

d. Rules directed to a *specifically named* person or group of persons *and* which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)

e. Legal rulings *of counsel* issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (g).)

f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. *City of San Joaquin v. State Board of Equalization* (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest) ("*San Joaquin*"); see *Roth v. Department of Veterans Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); *Nadler v. California Veterans Board* (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see *Del Mar Canning Co. v. Payne* (1946) 29 Cal.2d 380, 384 (permittee's agreement to abide by the rules in application may be assumed to have been forced on him by agency as a condition required of all applicants for permits, and in any event should be construed as an agreement to abide by the lawful and valid rules of the commission); see *International Association of Fire Fighters v. City of San Leandro* (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see *Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable). The most complete OAL analysis of the "contract defense" may be found in **1991 OAL Determination No. 6,** (Department of Developmental Services, October 3, 1991, Docket No. 90-008), CRNR, 91, No. 43-Z, p. 1451, 1458, 1461; typewritten version, pp. 168-169, 175-177, 197-200. Relying in part on *Grier v. Kizer*, 268 Cal. Rptr. at 253, **1991 OAL Determination No. 6** rejected DDS' contention (which had been based on *San Joaquin*) that a contractual provision cannot be a standard of general application for APA purposes. The primary APA holding of *San Joaquin* was that a "statistical accounting technique" can never be a "regulation" within the meaning of the APA; a possible secondary holding was that a contractual provision previously agreed to by the complaining party is not subject to the APA. *Grier v. Kizer*, upholding **1987 OAL**

Determination No. 10, expressly rejected the primary *San Joaquin* holding, noting that this holding appeared to have lost its precedential value due to the subsequent, inconsistent Supreme Court decision in *Armistead.*

Items a, b, and c, which are drawn from Government Code section 11342, subdivision (g), may also correctly be characterized as "exclusions" from the statutory definition of "regulation"--rather than as APA "exceptions." Whether these three statutory provisions are characterized as "exclusions," "exceptions," or "exemptions," it is nonetheless *first* necessary to determine whether the challenged agency rule meets the two-pronged "regulation" test: *if* an agency rule is *either* not (1) a "standard of general application" *or* (2) "adopted . . . to implement, interpret, or make specific the law enforced or administered by [the agency]," *then* there is no need to reach the question of whether the rule has been (a) "excluded" from the definition of "regulation" or (b) "exempted" or "excepted" from APA rulemaking requirements. In *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, the Court followed the above two-phase analysis. *Tidewater v. Bradshaw* (1996) 14 Cal.4th 571, 59 Cal.Rptr.2d 186, 194, reaffirmed use of the *Grier* two prong test and relied upon *Union of American Physicians* (1990) 223 Cal.App.3d 490, 501, 272 Cal.Rptr. 886, 891, 89 and *Roth* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552, for its further interpretation.

60. Government Code section 11342, subdivision (g).

61. MPP Section 12-103.13 provides:

".13 Provide the following information with the application:

. . .

.132 The applicant's rights and responsibilities.

62. 45 CFR 303.2(a)(2) states in part that:

"**303.2 Establishment of cases and maintenance of case records.**

(a) The IV-D *agency must*

:

(2) When an individual requests an application or IV-D services, *provide an application to the individual* on the day the individual makes a request in person or send an application to the individual within no more than 5 working days of a written or telephone request. *Information describing* available services, *the individual's rights and responsibilities*, and the State's fees, cost recovery and distribution policies must accompany all applications for services and *must be provided to AFDC, Medicaid and title IV-E foster care applicants or recipients* within no more than 5 working days of referral to the IV-D agency; and . . ." [Emphasis added.]

63. See endnote 57.

64. Statutes of 1957, chapter 916, page 2124, section 1.

65. A general rule of statutory construction is that, "[i]f the language is clear, there can be no room for interpretation; effect must be given to the plain meaning of the words."*Building Industry Assn. v. City of Camarillo* (1986) 41 Cal.3d 810, 818, 226 Cal.Rptr. 81, 85. (questioned on other grounds, *Farnham v. Superior Court* (1997) 60 Cal.App.4th 69, 70 Cal.Rptr.2d 85.). The California Court of Appeal in *Johnston v. Department of Personnel Administration* (1987) 191 Cal.App.3d 1218, 1223, 236 Cal.Rptr. 853, 856 summarized its responsibilities related to statutory construction as follows:

> "Certain rules of statutory construction guide our consideration. In *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 110 Cal.Rptr. 144, 514 P.2d 1224 the court stated: 'We begin with the fundamental rule that a court "should ascertain the intent of the Legislature so as to effectuate the purpose of the law." . . . We are required to give effect to statutes "according to the usual, ordinary import of the language employed in framing them." [Citations.]'"
>
> "As a general rule of statutory construction, if a statute announces a general rule and makes no exception thereto, the courts can make none. (*Stockton Theatres, Inc. v. Palermo* (1956) 47 Cal.2d 469, 476, 304 P.2d 7). A court may not insert into a statute qualifying provisions not included or rewrite a statute to conform to an inferred intention that does not appear from its language. (*Mills v. Superior Court* (1986) 42 Cal.3d 951, 957, 232 Cal.Rptr. 141, 728 P.2d 211.)"

66. *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130.

67. **1993 OAL Determination No. 5.** (State Personnel Board and Department of Justice, December 14, 1993, Docket No. 90-020), California Regulatory Notice Register (CRNR) 94, Volume 2-Z, January 14, 1994, p.61 at 105; typewritten version at p. 266.